NO. 90-1008

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

CONNECTICUT OFFICE OF CONSUMER COUNSEL
CONNECTICUT DEPARTMENT OF PUBLIC UTILITY CONTROL
CONNECTICUT ATTORNEY GENERAL, Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
UNITED STATES OF AMERICA, Respondents,

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, Intervenor.

REPLY TO BRIEF IN OPPOSITION

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NOTE: On January 9, 1991, Richard Blumenthal succeeded Clarine Nardi Riddle as the Attorney General for the State of Connecticut.

TABLE OF AUTHORITIES

The Decision On Appeal Is Directly Antithetical To The Goals Of The Federal Communications Act Of 1934

One of the undisputed essential goals of The Communications Act of 1934 was the creation and provision of a universal, nationwide system of telecommunications. This system was established in large part through the creation of a nationally-averaged pool of costs, costs shared by all telecommunications customers through nationally-averaged rates. Such rates historically did not discriminate between customers on the basis of such differences in the national system as state-specific taxing schemes, infrastructure costs, or population densities. All of that changed, however,

with the FCC's approval of AT&T's Connecticut gross receipts tax surcharge.

The Second Circuit Court of Appeals' tacit approval of the segregation of Connecticut's gross receipts tax from AT&T's national pool of all other expenses, through the surcharge at issue, sets a dangerous precedent which is antithetical to the goals of the Federal Communications Act. Moreover, the court's decision establishes this precedent without an evidentiary hearing or cost of service study, required in this case to examine the appropriateness of the action in light of the factual issues raised before the FCC but unresolved to this day. (See Petition for Writ of Certiorari at 38-39.) In so doing, the Court of Appeals has sanctioned an arbitrary and capricious agency decision.

As a result, Connecticut customers of AT&T have been forced to pay not only the full expense of the gross receipts tax levied upon AT&T in Connecticut, but also a portion of all non-gross receipts taxes levied upon citizens of all fifty states, while receiving service no different than that received in any other state. Such a result constitutes unreasonable rate discrimination, that is not validated by the Second Circuit's claim that the absence of a more ubiquitous taxing scheme in Connecticut justified the discrimination.

Because of the nature of interstate telecommunications, and its use of the local telephone company franchise to complete long distance calls, interstate telecommunications companies such as AT&T are allowed an opportunity to earn millions of dollars in annual revenues in

a particular state utilizing only a minimal level of taxable in-state property. As the FCC indicated in their opposition in this proceeding,

> All long distance calls require the use of both local telephone plant and long distance facilities. A typical long distance call begins on an individual subscriber's local loop, travels through local switches to long distance lines, and ultimately returns to another local system where the recipient of the call resides or does business.
>
> FCC Opposition, footnote 2, p. 3.

The right of states to charge utilities with franchise fees for the use of the public right-of-way, and for other benefits provided by the states, is universally acknowledged and uncontested in this proceeding. The unique nature of utility service in general warrants exceptional, rather than ubiquitous tax

treatment. Because of the utilization of the local telephone utility infrastructure by long distance telecommunications companies, at "both ends" of any long distance call, a unique rather than ubiquitous taxing structure is not only appropriate, but necessary for the establishment of an effective taxation structure.

Existing federal statutes contain adequate protections and remedies for any party alleging that a state's taxation of long distance telecommunications has resulted in unreasonable rates. See 47 U.S.C. §§ 201, 202 and 208.

The record in this proceeding is devoid of any evidence that any other state, individual or other entity has filed a complaint with the FCC objecting to Connecticut's gross receipts tax policy, a policy first established over

one hundred years ago. As indicated in the Petition for Writ of Certiorari, the only objections on record in these proceedings were raised by other state consumer advocates and state agencies against AT&T's surcharge proposal. (Petition, pp. 10-11.)

By affirming the gross receipts tax surcharge, the Second Circuit Court of Appeals has affirmed unreasonable rate discrimination, and thus has established the first significant degradation of nationally-averaged rates since the passage of the Telecommunications Act of 1934, without so much as an evidentiary hearing.

CONCLUSION

For these various reasons, the Petitioners urge the Court to grant their Petition for Writ of Certiorari.

Respectfully submitted,

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